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JAMES H. McKENNEY.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1887.

CLARENCE P. HUNT,

VS.

SALLIE S. BLACKBURN, ET AL.

No. 199.

ASSIGNMENT OF ERRORS AND BRIEF,

OF

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FOR APPELLANT.

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Defendant Sallie Blackburn, then Buck, on the 24th of April, 1868, bought of one Shepard one undivided half of 973 acres of land in Desha county, Arkansas, and took a title bond stipulating for a mode of division, to be made between her and her vendor as soon as practicable, and specifying the parts the vendor was to retain and she was to take. On division, a deed was to be made. Vendor and vendee took possession of their parts, respectively, and held accordingly. In June following, Mrs. Buck's husband bought of the same vendor the other half of the land, and took a writing to that effect. In January, 1869, the husband sold his half to J. S. Drake, and made a deed, in which defendant, his wife, joined.

Drake cultivated the lands jointly with Buck and wife to 1872, when Winfrey bought of Drake, and for a year or two

he cultivated a portion of the land, but during a part of the time it was not the part designated in the original title bond as the part to be assigned to the vendor on partition—*i. e.*, the husband's part.

Mr. Buck, about this time, died, and the defendant afterward married Blackburn, who is also dead.

On the death of her first husband, Mrs. Buck filed a bill in chancery, setting up the separate purchase and title of herself and husband each to one-half, and the court decreed that she was entitled to one-half and Drake or Winfrey to the other half.

Then a dispute arose about a quarter section of the land omitted, by mistake, from the deeds of Buck to Drake and the agreement of sale from Drake to Winfrey, and Winfrey filed a bill in chancery at Memphis for rescission against Drake. About the same time, defendant, Mrs. Buck, and Drake filed their bill in Arkansas to compel Winfrey to take the title, alleging that Mrs. Buck owned one-half and Winfrey the other. The court decreed a reformation of the deeds, and quieted the respective titles of defendant, Mrs. Buck, and Winfrey to their respective halves.

These two decrees stand unreversed, and the first unappealed from, the second decided on appeal in the Supreme Court of Arkansas.

Winfrey became bankrupt, and his interest was bought by W. G. Weatherford, who conveyed to appellant, Hunt.

Drake had previous to this become embarrassed, and still being indebted for the land, he procured the money from Hunt to pay for it; and the subsequent purchase at bankrupt sale and conveyance by Weatherford to Hunt were agreed upon as

the means by which Hunt should have the land for the money advanced.

Fols. 7–8, 66–67, 74.

Hunt advanced his money, and took the title to the land, on the advice of Weatherford that the title was a good one, and Weatherford gave that advice upon personal knowledge of every step in the business, from the first title bond to Mrs. Buck to the advance of the money by Hunt.

Hunt also bought, on the 16th of September, 1872, the same half at tax sale, and holds a deed therefor.

When Buck sold to Drake, Drake required that the title should be examined by his lawyer in Memphis. The lawyer objected to the deed drawn by Mr. Weatherford, because it was acknowledged before a Justice of the Peace, which was good in Arkansas, but would not have been good for land in Tennessee. The original vendor, Shepard, had made a deed to Buck and wife (Fol. 76), recognizing the separate purchases and interests. This was, by the Memphis lawyer of Drake, objected to, and a new deed substituted to Buck and wife jointly.

Fols. 49, 62, 75–76.

This deed bears even date with the deed from Buck and wife to Drake, 2d of January, 1869.

Mrs. Blackburn now claims to be the owner of the land by survivorship in virtue of the deed of Shepard, substituted in Memphis for the former deed drawn by Weatherford, executed at the time of the sale to Drake, and drawn by his lawyer for the very purpose of that sale. This deed is acknowledged before the proper clerk, who says: "Voluntarily appeared before me, S. S. Buck, wife to the said W. B., to me personally well

known to be the person whose name appears upon the within and foregoing *deed*, and in the absence of her husband declared that she had of her own free will signed and sealed the relinquishment of dower therein expressed for the purposes therein contained," etc.

ASSIGNMENT OF ERRORS.

The court below, to come to his conclusion, must have held:

1st. That the defendant, then Mrs. Buck, and her husband, W. A. Buck, in the act of sale to Drake, and in the making of a new deed by Shepard for that purpose, intended to abrogate the original separate purchases and to create a joint estate, the effect of which would have been to defeat the very purpose the parties had in view. This was error.

2. If the parties abandoned the original separate purchases, and joined in the deed to Drake with intent in that way to convey jointly, then the conveyance is effectual in that form, and the error in the acknowledgment is simply a clerical error, and cured by the Arkansas statutes of Mar. 8, 1883, and Mar. 14, 1883, Rev. Stats. 683–684. Construed in Green v. Abraham, 43 Ark. 420; Johnson v. Richardson, 44 Ark. 372; Apel v. Kelsey (47 Ark. 413), 2 S.W. Rep. 102. And it was error to hold that this did not convey Mrs. B.'s interest in the undivided half.

3. That the acts, declarations, letters and statements of Mrs. B., of record, brought home to complainant Hunt, and acted upon by him in his advance of money and purchase of Drake, did not constitute an equitable estoppel. This was error.

4. That the decrees of the Chancery Court of Desha county and of the Supreme Court of Arkansas in the two cases of Buck

v. the Heirs of Buck, Drake and Winfrey, and Blackburn and Drake v. Randolph, Winfrey et als., were not estoppels of record. This was error.

5. The tax deed to Drake conveys the title to Drake, and it was error to ignore it.

6. He dismissed the bill, when he ought to have granted the relief prayed.

It is believed to be unnecessary to make any argument on the facts. Mrs. Blackburn's statements are not materially contradictory of those of Mr. Weatherford and Drake, and we are safe in assuming that every word Mr. Weatherford states is perfectly truthful. His standing would preclude any possibility of doubt on this point.

Mrs. Buck-Blackburn, in her answer, Fol. 30–31, does claim that the second purchase of half was joint by her husband with herself. But if the first deed had read that way, for what was any substitution made, that being the character of the deed substituted? In her sworn bill against the heirs of Buck (Fol. 21) she avers the contrary. (Fols. 16–17.) Her acknowledgment of the deed to Drake to bar *dower* (Fol. 3), and the whole drift of the facts contradict her and sustain Mr. Weatherford. She denies that Drake or Winfrey were ever in possession of the lands, or that they cultivated the same with her. (Fol. 33.) In this she is contradicted by Drake. (Fol. 73.)

She joins with Drake in the bill to compel Winfrey to take the title, and there she states the case as Mr. Weatherford's testimony describes it.

See that case, stated in 33 Ark. Rep., (fol. 25.)

She makes the deed to Drake to relinquish dower on her

husband's sale of his half. With this Mr. Weatherford had nothing to do. It was the work of the Memphis lawyer of Drake. She states in her bill against the heirs that it was for the relinquishment of dower. (Fols. 15–16.) She states in her deposition in this case (Fol. 21) that she thought she only relinquished *dower*.

She states in a letter to Weatherford, "that it is Drake's half of the land that is sold for taxes, and not mine" (hers). (Fol. 84.)

Thus in every act and allegation of hers up to the time of the answer in this case she confirms Weatherford and contradicts her present position.

The purchases of Mrs. Buck and her husband of the two interests being separate and distinct, and the first deed being so drawn, no joint estate ever arose in them to give operation to the rule of the common law that husband and wife being one in law took *per tout et non per my*.

When an estate is conveyed to a man and a woman who are not married and who afterwards intermarry, as they originally took by moieties, they will continue to hold by moieties after marriage.

2. Bl. Com. 182. Am. n. 10. Citing 1 Inst. 5.
Moody v. Moody, Am. b. 649. 2 Cru. Dig. 511, 515, 448.

So distinct purchases, as here, and the deed of Shepard, accordingly, created an estate by moieties, and did not vest the entirety in husband and wife.

The destruction of one deed and the substitution of a new one did not affect the estate which was vested by the first deed, and could not be divested except by deed of the vendees.

Admitting that such substitution, however, would have effect according to the *intent* of the parties, that intent is shown by the fact that it was made in the negotiation for the sale by Buck to Drake and for the purpose of that sale; that it was simultaneous with or subsequent to Buck's deed to Drake; simultaneous if Shepard was in Memphis with the other parties; subsequent, if then prepared and dated, and executed after their return to Arkansas.

The deed from Buck to Drake, made in the presence and with the knowledge and joinder of defendant, Mrs. B., is competent and conclusive evidence of the intent (Elliott v. Sackett, 108 U. S. 152. Cited in 109 U. S. 352, and in 111 U. S. 228), and of the fact that it was not intended to change the separate estates of Buck and wife in their respective moieties, and so it would support this bill as a bill to reform that deed, which, under the general prayer, would be allowable.

It would be a reproach to the jurisprudence of an enlightened age to allow a paper executed with intent to perfect a conveyance so to operate as to defeat that conveyance, contrary to the intent of every party to the transaction and upon grounds purely artificial and technical.

ACKNOWLEDGMENT GOOD, OR CURED BY STATUTE.

On the second ground of error, it is clear that by the acts of March 8, 1883, Sec. 3, and March 14, 1883, Rev. Stat. Ark. 1884, Secs. 683 and 684, the deed of Mrs. B. of January 2, 1869, is operative to convey the estate which it purports on its face to convey, though the clerk mistook the object of the deed. The deed is identified by the certificate as the "within and foregoing," and it states, according to the statutory form, that Sallie S. Buck, to the clerk known "to be the person whose

name appears upon the within and foregoing deed," acknowledged in the absence of her husband that she "had of her own free will signed and sealed the relinquishment of dower therein expressed for the purposes therein contained and set forth, without compulsion or undue influence of her said husband."

Now when the deed is read, and it appears to be the joint deed of husband and wife, and it also appears that it is not a relinquishment of dower, but a deed in fee with warranty, it then at once becomes apparent that the clerk has attached a printed form, and instead of correcting it has allowed the words "the within relinquishment of dower" to stand unerased and uncorrected; so that, though she acknowledged what she had done (*i. e.*, executed the deed), the clerk states her acknowledgment to be of what would be a different paper.

It is therefore a mere discrepancy in the description of the paper which might be fatal if its identity was otherwise in any way doubtful; but as it is beyond question that what she acknowledged was her act, "the within deed," the misdescription can not raise even a doubt.

If it did, the statute is a perfect cure and the joint interest of the wife passes by it. Suppose the clerk had said, instead of "relinquishment of dower," the within "title bond," and the within was, as here, a deed, could any doubt arise as to what was meant? Yet there the mistake would be unaccountable; while here the error is one of the most natural conceivable from the frequency of such relinquishments.

The statute of March 8, 1883, declares that "*all deeds shall be held valid to pass the estate which such* CONVEYANCE *purports to transfer, although such acknowledgment may have been on any account defective.*"

The policy of such a statute was discussed in this court in Webb v. Weatherhead's Less., 17 How. 576. The character of such legislation entitles it to a most favorable construction, while the constant repetition of such acts in every State, and especially in Arkansas, and the fact that this act is accompanied by one of six days later date to the same effect, gives this construction the strongest possible foundation.

But the courts of Arkansas have spoken in the construction of this and other like statutes.

In Reed v. Hart, 45 Ark. 41, they held it to apply to a case pending in the Supreme Court at the time of its passage, and reversed a judgment right when made.

In Green v. Abraham, 43 Ark. 420, the court held a deed acknowledged by the grantor before himself good by virtue of the curing act, though the acknowledgment was void when made. Citing Cooley Const. Lim. 463.

In Apel v. Kelsey, 47 Ark. 413, acknowledgment before a J. P. in Ohio, void, but cured by act of March 8, 1883.

In Johnson v. Richardson, 44 Ark. 372, the act of March 8, 1883, is held to cure acknowledgment of a married woman, the statute excepting from its operation minors and insane persons, and not excepting married women. In this case the deed was held to pass the married woman's estate, though there was no privy examination at all, and the acknowledgment was in the form for persons *sui juris*.

ESTOPPEL IN PAIS.

Mrs. Buck's act in joining in that sale, her statements in her two bills, and her parol statement to Weatherford, her letters

to him, acted upon by Appellant Hunt, form an estoppel *in pais* on every principle on which such estoppels operate. These acts were both when a widow and when a married woman. They were acted upon by Hunt.

Stowe v. U. S. 19 Wal. 13.

Morgan v. C. & A. R. R. Co., 96 U. S. 716, citing Bk. v. Lee, 13 Pet. 107.

Mercht. Bk v. St Bk. 10 Wal. 604. See also Ill. cases cited in same case.

Baker v. Humphrey, 101 U. S. 494.

Dickerson v. Colgrove, 100 U. S. 578.

Ogilvie v. Knox Ins. Co. 22 How. 380.

Laughlin v. Mitchell, 121 U. S. 411.

The law of Arkansas is in strict accord with the general rule on the subject of estoppel.

Trapnall v. Burton, 24 Ark. 399.

Shall v. Biscoe, 18 Ark, 164. (See Pike's brief in this case.)

Rayburn v. Pryor, 14 Ark. 505.

Bramble v. Kingsburg, 39 Ark. 131.

Gill v. Hamlin, 3 S. W. Rep. 518.

If these statements were untrue, but were made in such manner that a person investigating the title would be liable to be deceived by them, and was deceived by them into the belief that the title was good, and made advances and afterwards purchased in this belief so induced, that would be a clear case of estoppel by acts *in pais*.

ESTOPPEL OF RECORD.

The decree in the Chancery Court of Desha, Fols. 23–24, declaring her right to one undivided half of said land, and

vesting title in her and quieting her title, is an express adjudication of her right to an undivided half and no more, and of Drake & Winfrey's right to the other half. She files that bill to remove a cloud on one-half the land, stating Drake's purchase of her husband's half, and procured a decree with Drake before the court as defendant to her bill, that he was entitled to the undivided half bought by her husband separately from her purchase.

Fols. 23–24.

On technical grounds a party can not claim one-half his rights in one bill and then file a bill to get the other half. He is bound to embrace his whole cause of action in one suit.

See Stockton v. Ford, 18 How. 418.

The rule is well stated in Stark v. Starr, 94 U. S. 477, though that case was an exception.

The decree of the Supreme Court of Arkansas (33 Ark. Rep. 119, which, under the statement in the bill and the clerk's certificate, is legal evidence of the decree) is conclusive as an adjudication of the title of Drake in the whole premises, and of the obligation on Winfrey to take the title, and that his title was good against Mrs. B.

Mrs. B. joins in this bill with Drake as purchaser and owner of one-half and compels Winfrey to take it.

These cases adjudge the very points now raised, and on the principle of Minn. Ass'n v. Canfield, 121 U. S. 295, are conclusive.

The devolution of the title from Winfrey to Hunt is subject to no question in this case.

The decree in the Supreme Court of Tennessee as to the rescisson of the sale from Drake to Winfrey is of no moment in this case. It was conditional on execution of a reconveyance, which was never made. If it had taken effect it would operate merely to revest the title in Drake, and his deposition in this case would estop him from objecting to a decree in favor of Hunt; and the objection which he waives cannot be taken by the defendant.

It is clear that W. A. Buck and wife bought each a one-half interest in the land. This was unquestionably the original status of the title. If defendant obtains more than this, it must be under the deed drawn by Messick, by which Shepard conveys to her and her husband jointly. She disaffirms and denies this verbally, by letters and by solemn pleading. There is estoppel *in pais* and of record to preclude her from taking this view of this deed. Its purpose was solely to perfect what Drake's lawyer supposed to be a defect in the title to the one-half interest of W. A. Buck, which was being conveyed to Drake. If this is true, then the adjudication in case of S. S. Blackburn and the heirs of W. A. Buck (Rec. p. 9) is correct. If this is not true, why did defendant join in the deed to Drake? If she claimed under the second deed from Shepard, and joined for the purpose of conveying, along with her husband, a one-half interest to Drake, then the result is the same as if, under the individual purchases of herself and husband, she joined for the purpose of waiving her dower in her husband's one-half interest. If she did not join for one of these purposes, then why was it that, claiming under the second deed from Shepard, she intended only to waive dower? Was it that she obtained the second deed for Shepard to sign in order to correct the error then existing in the title, so as to make a title with survivorship, and then joined for the purpose of

waiving dower only? This is the only view that can give her more than one-half interest, and this view is so full of contradictions as to make it inconceivable that an attempt should be made to prove it.

She must here prove that it was under a mistake that she and her husband (Buck) purchased distinct undivided half interests, subject to the agreement to actually partition; that it was under a mistake and by overweening influence that she alleged and swore that she joined in the deed to Drake for the sole purpose of relinquishing her dower right in W. A. Buck's one-half of said land, and that in reality she joined for the purpose of waiving dower which she did not have.

Is there anything in the proof to show that there was any mistake in the original purchases by S. S. and W. A. Buck? Is there anything to suggest that, when Drake's lawyer drew a deed from Shepard to Buck and wife in order to cure what he supposed to be a defect in the title to W. A. Buck's one-half, the parties intended to have the title so fixed as to destroy the right of Buck to convey his interest, which he was then in the act of conveying? Such an intent would be a fraud on Drake. Assuming the title in S. S. and W. A. Buck under the second deed from Shepard, is there anything to show they did not intend to convey a one-half interest in the land to Drake?

J. B. HEISKELL.

APPENDIX.

From Mansfield's Digest of Statutes of Arkansas, 1884.

SEC. 683. All deeds and other conveyances recorded prior to the first day of January, 1883, purporting to have been acknowledged before any officer, and which have not heretofore been invalidated by any judicial proceeding, shall be held valid to pass the estate which such conveyance purports to transfer, although such acknowledgment may have been on any account defective (excepting only cases where such conveyances shall have been executed by minors or insane persons); *provided*, that the record of all such instruments shall be as valid as if they had been acknowledged and recorded according to law.

Act of March 8, 1883, sec. 6.

SEC. 684. All conveyances and other instruments of writing authorized by law to be recorded, or which have heretofore been recorded in any county in this State, the proof of execution whereof is insufficient because the officer certifying such execution omitted any words in his certificate, or because such officer failed or omitted to attach his seal of office to such certificate, or attached to any certificate any seal not bearing the words or devices required by law, or otherwise informal, shall be as valid and binding as though the certificate of acknowledgment or proof of execution was in due form and bore proper seal.

Act of March 14, 1883.